No. 84-114

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

KENNETH R. AMIDON, DONALD H. LAJOIE
and JAMES M. ELWOOD,

Petitioners

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE,
JOHN F. LEHMAN, JR., SECRETARY OF
NAVY, and ADMIRAL THOMAS M. HAYWARD,
CHIEF OF NAVAL OPERATIONS,

Respondents

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

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Pursuant to Rule 22.6, petitioners submit this Supplemental Brief calling attention to the unanimous passage of House Bill 5479 reauthorizing and clarifying the

Equal Access to Justice Act, and the veto of that Bill by the President on November 9, 1984.

The first question presented for review by the Petition filed herein involves the proper construction of the phrase "position of the United States" as used in the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). On October 11, 1984, without dissenting vote, both the House and Senate passed legislation, H.R. 5479, reauthorizing and clarifying the EAJA. 130 Cong. Rec. S.14387-14388 (Daily ed. October 11, 1984). The most significant clarification in the Bill, as passed by Congress, is contained in Section 2(b)(3) wherein the following sub-section is added:

> (D) "position of the United States" includes the underlying agency action which led to the litigation;. . . .

130 Cong. Rec. S. 14387 (Daily Ed. Oct. 11, 1984).

In the Report of the House Judiciary Committee accompanying H.R. 5479, H.Rep. No. 992, 98th Cong., 2d Sess. (Sept. 6, 1984)(the "House Report"), the purpose of this clarifying amendment is explicated:

> Part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act. ...[C]ourts have construed the "position of the United States" which must be "substantially justified" in a narrow fashion which has helped the Federal Government escape liability for awards. H.R. 5479 clarifies both of these points. When the escape clause was originally written, it was understood that "position of the United States" included the underlying action--including agency action--which led to the litigation. However, courts have been divided on the meaning of "position of the United States." H.R. 5479 clarifies that the broader meaning applies."
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> House Report at pages 6-7 (footnotes omitted)

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> [T]hose changes which merely clarify the existing law to ensure that the Congressional intent of the original Act is implemented[32] would have the same effective date as the original Act--i.e., would apply to matters pending on or after October 1, 1981.
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> 32 For example, clarification of the terms "position of the agency" or "position of the United States."
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> House Report at page 15

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The first issue presented for review involves the frustration of the Congressional intent of the original Act by the Fourth Circuit and five other circuits. The Solicitor General has urged that in addressing this issue, the Court should defer to Congress (Respondents' Brief, page 7). Petitioners concur. Congress has again clearly spoken. Absent a grant of the petition for certiorari, Congressional intent will remain frustrated.

On November 9, 1984, however, the President exercised his power to veto H.R. 5479 pursuant to Article 1, Section 7, Clause 2 of the United States Constitution. The Administration had supported the straight reauthorization of the EAJA. S. Rep. No. 586, 98th Cong., 2d Sess. pp. 21, 26 (August 9, 1984). The President's veto message makes clear that his veto was occasioned by the Congressional clarification of its original intent as to the meaning of "position of the United States."

The President clearly has the constitutional power to veto H.R. 5479 and in view of the adjournment of the Congress such action will be final as to that bill. The veto of H.R. 5479, however, has no impact on the meaning of, or Congressional intent of the original Act. The President is not at liberty to repeal Congressional enactment. Catano v. Local Bd. No. 94

Selective Service System, 298 F.Supp. 1183, 1188 (E.D. Pa. 1969). This fundamental precept is not altered by the fact that the legislation was signed into law by the previous Administration.

As this Court noted in United States v. Nixon, 418 U.S. 683, 704 (1974):

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.

The Executive Branch does not dictate the meaning of duly enacted laws. Rather, it

is the province and duty of this Court "to say what the law is" with respect to the meaning of the phrase "position of the United States." E.g., United States v. Nixon, 418 U.S. at 705; Marbury v. Madison, 1 Cranch 137, 177 (1803).

By exercise of his constitutional veto power, the President has vitiated the Congressional resolution of the proper construction of the term "position of the United States." The Executive Branch, although a party to this litigation, has no veto power over a judicial resolution of the conflict. Certiorari should be granted.

By Executive fiat, this Court has been saddled with the obligation of resolving the conflict over the meaning of the term "position of the United States." The issue is relevant to hundreds of pending cases. In view of the now clear Congressional intent and this Court's pressing docket,

summary disposition might be appropriate Indeed the Solicitor General should at this stage concede error. Denial of the petition for certiorari as a result of the President's veto would erode the delicate system of checks and balances flowing from our scheme of tripartite government.

Respectfully submitted,

Dated:
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